



July 22, 1999

Mr. Paul C. Sarahan
Director
Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR99-2061

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 126011.

The Texas Natural Resource Conservation Commission (the "commission") received a request for "any documents associated with enforcement actions or investigations performed or contemplated involving Silver Creek Materials Recycling and Composting." The commission has made some of the requested documents available to the requestor. You claim that remaining documents are excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a).

A contested case under the Administrative Procedure Act is litigation for purposes of section 552.103(a). Open Records Decision No. 588 (1991). You explain that the commission in involved in a "pending enforcement action" against Silver Creek Materials Recycling and Composting. We have reviewed the submitted documents and agree that they relate to the pending enforcement action. Therefore, the commission may withhold the documents from disclosure under section 552.103(a) of the Government Code.

In reaching this conclusion, however, we assume that the opposing party in the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because we are able to resolve this matter under section 552.103, we do not address your additional arguments against disclosure. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 126011

Encl. Submitted documents

cc: Mr. Trey Jones
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(w/o enclosures)